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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

KR PARTNERS

KES COMMUNICATIONS, INC.

LORI LYNN FORBES

For a Construction Permit for a
New FM Station on Channel 256C in
Waimea, Hawaii

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

) MM Docket No. 93-53
)
) File No. BPH-911001MB
)
) File No. BPH-911003MH
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY TO KES OPPOSITION TO MOTION ENLARGE THE ISSUES

KR PARTNERS

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Suite 504
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

May 24, 1993

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SUMMARY OF ARGUMENT

KR Partners herein replies to the Opposition of KES Communications, Inc. to KR's Motion to Enlarge the Issues requesting site availability and misrepresentation/lack of candor issues against KES.

KES has offered no proof that it has reasonable assurance of the availability of its proposed site. The letter it obtained from Motorola in September 1991 and upon which it relies constitutes nothing more than a willingness to consider the possibility of KES's use of the site. On its face, KES's site letter is inadequate. More importantly, the letter demonstrates that

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To: Honorable Joseph P. Gonzalez
Administrative Law Judge

REPLY TO KES OPPOSITION TO MOTION TO ENLARGE THE ISSUES

KR Partners ("KR"), by counsel, hereby replies to the Opposition to Motion to Enlarge the Issues ("Opposition") which KES Communications, Inc. filed on May 5, 1993. KES has opposed the addition of site availability and misrepresentation/lack of candor issues which KR sought in its April 15, 1993, Motion to Enlarge the Issues Against KES ("Motion"). KES has never contacted the owner of its proposed site and has not otherwise demonstrated that it has reasonable assurance of the site's availability. The requested issues should be added for the following reasons.

KR demonstrated in its Motion that KES specified its proposed site without ever contacting the owner of the land which it proposes to use. KES does not refute this fact. Indeed, nowhere in its Opposition does KES even identify the land owner. Instead, KES has relied on contacts with a representative of Motorola Communications International, Inc. ("Motorola"), which currently leases the site. Despite no statement from Motorola that it is

actually willing to make the site available to KES, and no contact with the site owner, KES asserts that it has reasonable assurance of site availability. KES is mistaken.

MOTOROLA HAS NOT PROVIDED REASONABLE ASSURANCE
OF SITE AVAILABILITY TO KES

KES points to a discussion between its consulting engineer, Mr. William G. Brown, and Mr. Conrad Loui of Motorola, and Mr. Loui's September 26, 1991, letter to KES, as providing reasonable assurance of site availability. Mr. Loui, in his letter to KES, does not state that Motorola was willing to make the site available to KES, but only that he was willing "to enter into negotiation" for the use of the site, subject to, among other things, the terms and conditions in Motorola's underlying lease. Mr. Loui wrote his letter following a discussion with KES's engineer on or about September 26, 1993, concerning KES's desire to construct an FM station which might involve a taller tower. See KES Opposition, Exhibit No. 3, Statement of Conrad Loui at paragraph 2.

Reasonable assurance cannot exist in the absence of negotiation between the parties. See Cuban-American Limited, 2 FCC Rcd 3264, 3266 (Rev. Bd. 1987), review denied in part, granted in part on other grounds, 67 RR 2d 1438 (1990). Mr. Loui's September 26 letter, written after a single discussion with KES's engineer, indicates nothing more than a willingness to enter into negotiations. A willingness to negotiate represents nothing more than a possibility that a site will be available, and does not constitute reasonable assurance of site availability. "A mere possibility that the site will be available is not sufficient." Processing of

FM and TV Broadcast Applications, 58 RR 2d 776, 782 (1985), citing William F. Wallace and Anne K. Wallace, 49 FCC 2d 1424 (Rev. Bd. 1974); See also Dutchess Communications Corp., 101 FCC 2d 243, 252 (Rev. Bd. 1985) (letter from site owner indicating only a willingness to negotiate a possible sale of the site did not provide reasonable assurance).

In his April 30, 1993, statement appended to KES's Opposition, Mr. Loui again does not state that Motorola is willing to make KES's proposed site available, only that "Motorola is receptive to the construction of a 400 foot (approx) tower." KES Opposition, Exhibit 3 at paragraph 3. Motorola's receptiveness to a 400 foot tower does not indicate that Motorola has considered KES's actual proposal, nor made any determination as to its merits. Like Mr. Loui's willingness to enter negotiations reflected in his September 26, 1991, letter, it does not provide reasonable assurance of the availability of KES's proposed site.

The statement of KES's engineer appended to KES's Opposition makes clear that in September 1991 no agreement had been reached with Mr. Loui or Motorola on who would even build the "approx" 400 foot tower, let alone the terms for the use of the site:

Mr. Loui and I briefly discussed two options for KES. One option would have KES replace the current Motorola 150 foot tower with an approximately 400 foot KES-owned structure. ... The other option would be for Motorola to build the taller tower and KES would lease tower and equipment space from Motorola. ... Given the probability of multiple applicants for the Waimea allocation both Mr. Loui and I felt it premature to investigate the exact details of the two options or investigate local permits.

KES Opposition, Exhibit No. 2, Technical Statement of William G. Brown, at pages 1-2. At most Mr. Brown had a preliminary discussion with Mr. Loui concerning KES's desire to use the site. This does not provide reasonable assurance. See William F. Wallace, 49 FCC 2d at 1427; El Camino Broadcasting Corp., 12 FCC 2d 25, 26 (Rev. Bd. 1968) ("mere possibility" of using a site does not provide reasonable assurance where the owner is "willing to discuss lease arrangement").

Mr. Brown's statement makes clear that the parties had not even discussed the terms under which KES could use the site (e.g., the price of lease payments or the duration of the lease, among other things). Some firm understanding regarding the use of the site, which requires some basic negotiation between the parties, is essential for reasonable assurance. Dutchess Communications, 101 FCC 2d at 253 (citations omitted); Cuban American Limited, 2 FCC Rcd 3264, 3266 (Rev. Bd. 1987), review denied in part, granted in part on other grounds, 67 RR 2d 1438 (1990), recon. denied, 68 RR 2d 1088 (1990) (citations omitted).

MOTOROLA DID NOT HAVE AUTHORITY TO PROVIDE REASONABLE ASSURANCE

All of this assumes, as KES argues, that Mr. Loui and Motorola had the authority to make the site available to KES. KES is forced to take this position because it never contacted, nor apparently ever sought to contact the owner of its proposed site. The site is owned by members of the Gomes family. In particular, Mr. Richard Alan Gomes, his parents, and other members of his family own the property. See Attachment A hereto, consisting of the Declaration

of Julie O'Connor and a copy of the relevant Hawaii Tax Map.¹ There is no evidence that KES or anyone on KES's behalf ever contacted the Gomes concerning the use of their property. Indeed, KES has never even identified the Gomes as owners of the site.

Instead, KES relies on the assertion that it did not need to contact the Gomes. KES cites to language in what it describes as Motorola's lease, a copy of which is attached to Mr. Brown's statement. KES Opposition, Exhibit 2. There are several problems with KES's argument. First, the document which KES identifies as Motorola's lease is not executed by any party, does not identify the landlord, does not state basic terms of the "lease," including the amount of rent due, the initial term (i.e., duration) of the lease, the renewal term, and renewal notice due date.² Other information also appears to be missing from the document. For example, the second page of the lease, at paragraph 19, ends in mid-sentence. The Addendum to the lease, which as discussed below is all important, is also unsigned. It is plainly evident from the face of the lease document attached to Mr. Brown's statement than

¹ Included as an attachment to KES's engineer's statement was a partial copy of the tax map (apparently from 1986, since it was attached to a document bearing that date) enlarged to show the property in question. A comparison of the copy attached to the engineer's statement, and the copy attached to Ms. O'Connor's Declaration, show them to depict the same parcel of land. The copy attached to the engineer's statement does not, however, include the ownership information contained in the copy attached to Ms. O'Connor's Declaration.

² This is an important consideration. Because the term of Motorola's underlying lease is unknown it is unknown whether Motorola will even continue to lease the property in question when KES is ready to construct its station, assuming its application is granted.

it cannot be a complete copy of Motorola's actual lease.³

building for radio transmitting equipment only, without the prior written consent of Landlord." Thus, Motorola's ability to sublease the use of the site is limited only to the use of its 150 foot tower and the transmitter building. Motorola does not have the right to sublease the site itself (i.e., the land) without the landlord's consent. The lease makes no provision for the construction of a 400 foot tower, and Motorola does not have the authority to give KES permission to construct its proposed taller tower. Neither could Motorola construct a taller tower without the Gomes' consent.

Because Motorola had no authority to make the site available for KES's proposed taller tower without the Gomes' consent, it had no ability to provide KES with reasonable assurance of the site's availability. Indeed, Mr. Loui has never asserted that Motorola had authority to make the site available to KES. In his April 30, 1993, statement, Mr. Loui only stated that Motorola is receptive to the construction of a taller tower. In his September 26, 1991, letter to KES he stated that he agreed "to enter into negotiation with you for a lease, subject to the terms and conditions in Motorola's underlying lease" Thus, not only did Mr. Loui indicate that Motorola was not the site owner, but only a tenant, he specifically stated that anything Motorola was willing to consider was subject to the terms of its underlying lease.⁴

⁴ There is no evidence that KES or its principal ever saw or knew the terms of the Motorola lease until the recent preparation of KES's Opposition. The cover letter from Mr. Loui to Mr. Brown transmitting the lease document is dated April 30, 1993. KES

When a site owner establishes conditions precedent to the use of a site, an applicant cannot simply ignore those conditions and still claim to have reasonable assurance of site availability. Dutchess Communications, 101 FCC 2d at 254 (citations omitted). At a minimum, after KES received Mr. Loui's letter conditioning his willingness to negotiate with KES on the terms of Motorola's underlying lease, KES should have investigated the terms of that lease to determine whether Motorola even had the authority to make the site available to KES. Had KES done so, it would have discovered that Motorola did not have authority to make the site available for KES's taller tower without the land owner's consent.

KES HAS NOT MET THE CONDITIONS PRECEDENT
UNDER CONRAD LOUI'S SEPTEMBER 26, 1991 LETTER

Even assuming that Motorola had authority to make the site available to KES, there were other conditions precedent which Mr. Loui set forth in his September 26, 1991, letter which KES needed to meet. For example, Mr. Loui's willingness to enter into negotiations was also subject to KES's proposal "meeting site and engineering standards." One of the requirements that KES believed it had to meet was using no more land than the existing "footprint" of Motorola's tower. That is, KES had to be able to construct its proposed tower, three times the height of Motorola's existing tower, using the same amount of land, including the same guy anchor

Mr. Brown, and with Mr. Loui's April 30, 1993, Statement. KES Opposition at footnote 3.

positions. See KES Opposition at page 5 and Exhibit 2 at page 2.⁵ KES, through the statement of its engineer, asserts that it determined that it could obtain a 400 foot tower that would meet this requirement. Ibid.

Although Mr. Brown discussed with Mr. Loui the construction of a tower approximately 400 feet in height, and obtained a price quote for a 400 foot tower guyed at a 100 foot radius,⁶ this is not the facility KES actually proposes. KES's application specifies an overall supporting structure height 138 meters, 453 feet above ground level. KES Application, Section V-B, Question 7. Thus, KES's actual tower would be approximately 450 feet in height with guy anchors located 97 feet from the base of the tower. See footnote 5. KES does not state or provide any evidence that it provided to Motorola any plans for its proposed tower such that Motorola could determine if it would, in fact, meet site and engineering standards.

The fact is that KES proposes a most unusual tower. Attachment B hereto is the Declaration of Mr. V.G. Duvall, Jr., a registered professional engineer who has worked in the design and construction of towers for more than 20 years. Mr. Duvall states that the construction of KES's proposed tower would not meet standard industry practices. He notes that the industry standard

⁵ Exhibit B to the Motorola lease shows the guy wire anchors for Motorola's existing tower located 97 feet from the base of the tower.

⁶ See September 30, 1991, letter from Tower Specialties, Inc. to Bromo Communications attached to Mr. Brown's statement.

calls for locating guy wire anchor positions at a distance of 70% to 80% of the height of the tower, with some occasional circumstances where a tower will have a guy radius at 50% of the tower height.⁷ To meet Motorola's conditions and guy its proposed 450 foot tower 97 feet from the tower base would result in a guy radius 21.6% of the height of its tower. Mr. Duvall avers that he does not know of any guyed tower which has a guy radius as short as KES proposes, and he describes briefly some of the engineering difficulties which such a tower design presents.

Mr. Duvall also contacted several tower manufacturers to determine whether they would be interested in or willing to work on the type of tower which KES has proposed. Without exception, each manufacturer told Mr. Duvall they would not want to be involved in such a project because the risks and potential liabilities of such a tower were too high. Mr. Duvall concludes his declaration by recommending that KES's proposed tower should not be installed.

The fact that KES has never presented any plans for its proposed tower to Motorola, combined with the unusual characteristics of KES's proposal which do not comply with standard industry practices, raises a substantial and material question whether KES could ever meet the site and engineering standards which are a precondition to Motorola's willingness to even enter into negotiations, assuming it had the authority do so under its lease.

⁷ Under the industry standard, KES would have to guy its tower at a radius of 315 to 360 feet from the base of its tower. Even using a 50% guy radius, the anchor positions would be 225 feet from the base of the tower, more than twice the distance of the existing anchor positions.

Whether KES obtained a price quote for a tower⁸ does not demonstrate that KES can meet the site and engineering standards which Motorola would require. There is no evidence that Motorola is willing to assume the high risk and potential liability which led the four tower manufacturers Mr. Duvall contacted to disclaim any interest in building the type of tower KES proposes.

RICHARD GOMES HAS CONFIRMED THAT KES
DOES NOT HAVE REASONABLE ASSURANCE

To offset the risk of the Company's failure to obtain the

not sign a statement for submission to the Commission unless the Commission requested him to do so, saying that he had no reason to sign such a statement since KES cannot build its proposed tower without his and his parents consent. See Attachment A at page 2.

As Ms. O'Connor avers, Mr. Gomes confirmed that neither KES nor its representative has ever contacted him or his parents concerning the use of their property for the construction of KES's proposed tower. He also stated that Mr. Loui stated to him that he had done a favor in telling a representative of KES that Motorola would entertain KES's use of the site, and in writing a letter to that effect, but that KES would have to supply its power and tower proposal to Motorola before any decision would be made. Mr. Loui told Mr. Gomes that he had never received a plan for KES's proposed tower and therefore had never given his actual approval for the use of the site. Mr. Gomes also confirmed that only the landlord (Mr. Gomes and his parents) can give approval for KES to construct a new tower on the property, and that he had never given any party authority to construct the approximate 450 foot tower which KES proposes. See Attachment A at pages 1-2.

CONCLUSION

Stated simply, KES has offered no proof that it has reasonable assurance of the availability of its proposed site. The letter it obtained from Mr. Loui in September 1991 and upon which it relies constitutes nothing more than a willingness to consider the

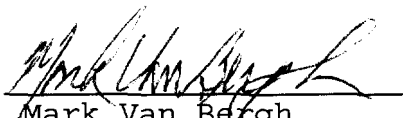
ments described therein, which confirm the matters addressed herein and raise substantial and material questions whether KES has reasonable assurance of its proposed site.

possibility of KES's use of the site. Thus, on its face, KES's site letter is inadequate. More importantly, the letter demonstrates that Motorola is not the owner of the site. Accepting what KES has offered as Motorola's current lease, it does not have authority to make the site available to KES to construct a new tower three times the height of Motorola's existing tower

3. To determine, in light of the foregoing issues, whether KES Communications, Inc. is basically qualified.

Respectfully submitted,

KR PARTNERS

By: 
Mark Van Bergh
Richard H. Waysdorf

WAYS DORF & VAN BERGH
Suite 504
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 785-2870

Dated: May 24, 1993

ATTACHMENT A

DECLARATION

I, Julie O'Connor, hereby state as follows:

During the week of May 9-15 I had two conversations with Richard Allan Gomes, who along with his parents is the owner of the property on which KES Communications, Inc. has proposed to locate its transmitter site. I had previously obtained a copy of the Tax Map containing the location of KES's proposed transmitter site, which showed Mr. Gomes and his parents as owners of the property. A copy of the Tax Map is attached to this declaration. I was also familiar with the Gomes' ownership of the property because the station at which I have worked for approximately the past three years, KLUA(FM), also leases its transmitter site on a different part of the Gomes' property.

Although other members of Mr. Gomes' family are also shown as owners of the property on the Tax Map, it is my understanding that the family has divided responsibility for the parcel of land such that Mr. Gomes and his parents are responsible for that part of the property which KES proposes to use for its transmitter site.

I spoke with Mr. Gomes concerning KES's proposal to use the site which Motorola currently leases from the Gomes for a 150 foot tower. I informed Mr. Gomes of KES's proposal to the FCC to build a new, approximately 450 foot tower at the same location. Mr. Gomes expressed his surprise at this because no one had ever contacted him or his parents for approval to build such a tower.

Loui, who oversees the use of the Motorola tower. I then spoke with Mr. Gomes after he had spoken with Mr. Loui. Mr. Gomes told me that Mr. Loui had stated to him that he "did a favor" in telling a representative of KES Communications and writing a letter to KES to the effect that Motorola would entertain letting KES use the Motorola site, but that KES would have to supply its power and tower proposal to Motorola before any final decision could be made. According to Mr. Gomes, Mr. Loui stated that neither Karen Glade, KES Communications, nor any of their representatives had ever presented Mr. Loui with a plan for the tower, and therefore Mr.

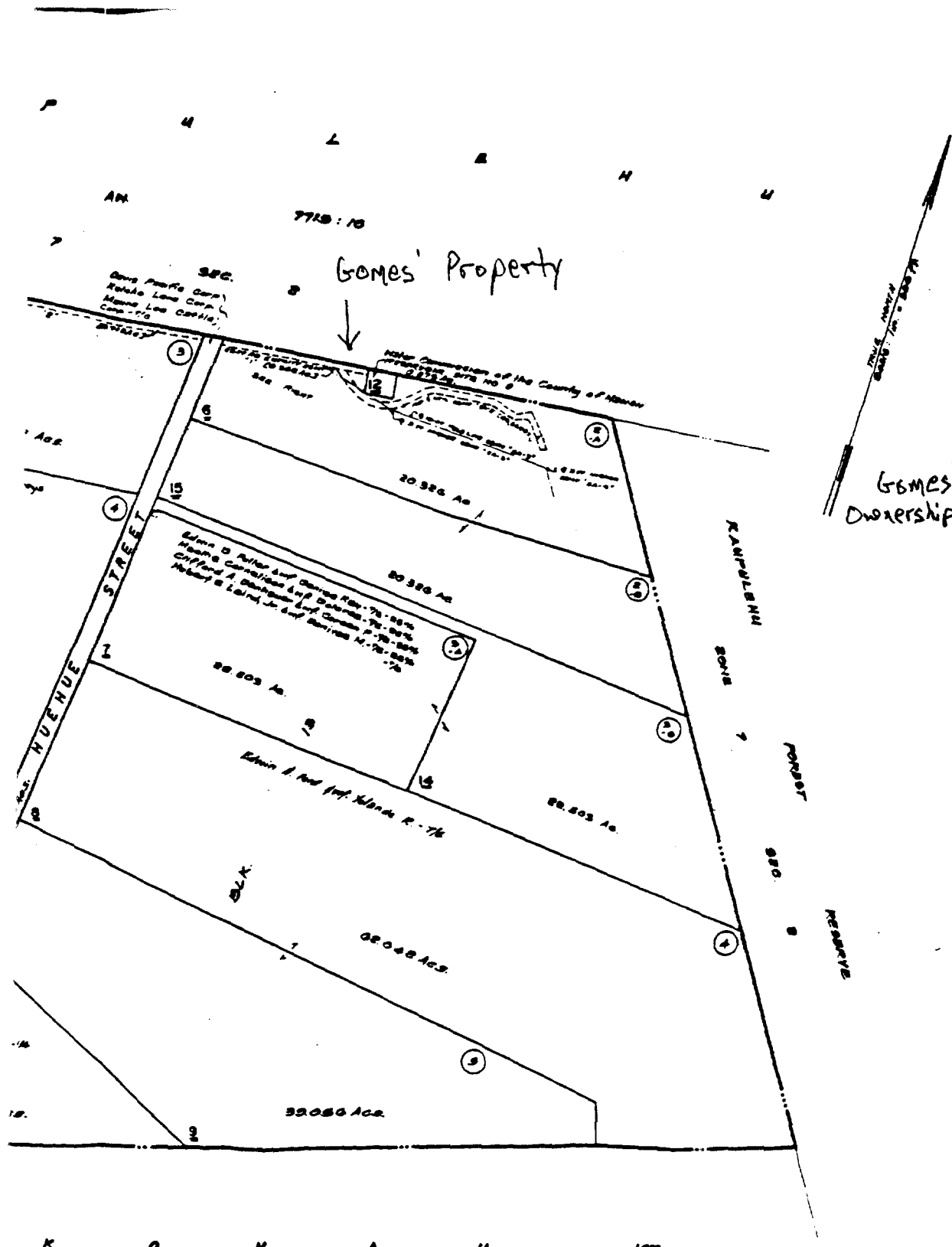
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THE F.B.I. MARK

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I hereby declare under penalty of perjury that the foregoing



Gomes' Ownership

- Charles Gomes & of Sharon - 7/8 - 1/4
- Richard Gomes, Jr. - 1/4
- Thomas T. Au
- Dorcas K. Miller
- Alan T. Wessmore - 1/4 - 1/4
- William Gomes, Sr. & of Mary - 7/8 - 1/4
- Richard Gomes & of Mary - 7/8 - 1/4

NOTE: All parcels owned by
Kohala Land Corp.
Kohala Land Corp. &
Mama Lee Corp.
unless otherwise noted

FOR PROPERTY ASSESSMENT PURPOSES
SUBJECT TO CHANGE

3 1545

DEPARTMENT OF TAXATION PROPERTY TECHNICAL OFFICE TAX MAPS BRANCH STATE OF HAWAII TAX MAP		
THIRD TAXATION DISTRICT		
ZONE	SEC.	PLAT
7	3	48
SCALE: 1 IN. = 500 FT.		

ATTACHMENT B

DECLARATION

I, V.G. Duvall, Jr., hereby state as follows:

I am currently the President of DES Consulting, Inc., a civil and structural engineering company located in Webster, Texas, which provides consulting and design services to numerous companies involved in the construction and installation of broadcast towers. I have worked for more than 20 years in the design and construction of towers, and am a Registered Professional Engineer in the states of California, Maryland, Virginia, Arizona, and Ohio. Attached to this statement is a synopsis of my resume.

I have reviewed the letter dated September 30, 1991, from Tower Specialties, Inc. to Bromo Communications concerning a proposed 400 foot tower to be located in Hawaii. As described in the Tower Specialties letter, it provided a price quote for a 400 foot tower with a guy radius of 100 feet (i.e., the guy wires for the tower would be anchored at a distance of 100 feet from the base of the tower). I have been told by legal counsel for KR Partners that the Tower Specialties letter pertains to the application of KES Communications, Inc. for a new FM station at Waimea, Hawaii, and that KES actually proposes in its application to construct a tower approximately 450 feet in height. I have also reviewed a copy of a document entitled Exhibit A pertaining to an antenna site land lease, and a document entitled Exhibit B, Plot Plan Details - Koloko, both of which I understand pertain to the property on which KES proposes to construct its tower.

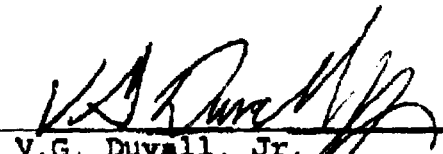
In addition, the following information is provided to the public:

terrific download into the mast (i.e., significant downward force on the tower). Because of these extreme conditions the tower would need to be a custom made structure of unusually large size. This would require significantly larger foundations at the base of the tower and the guy anchor points.

When I contacted each of the tower manufacturers, each one, without exception, stated they would not want to be involved in such a project. Each tower manufacturer gave basically the same reason: the risks and potential liabilities of such a tower were too high.

In my professional opinion, and based on my years of experience, I would recommend this tower not be installed.

I hereby declare under penalty of perjury that the foregoing matters are true and correct to the best of my personal knowledge. Executed this 21st day of May, 1993.


V.G. Duvall, Jr.
Professional Engineer

**Synopsis of Resume of:
V.G. Duvall, Jr., P.E.**

EMPLOYMENT

1992-Present

**PRESIDENT
DES Consulting, Inc.
Webster, TX**

1988-1992

**OWNER
Duvall Engineering Services
Webster, TX**

1981-1987

**CHIEF ENGINEER
Allied Tower Company, Inc.
Webster, TX**

1974-1981

OWNER, ENGINEER, ARCHITECT